

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
	)	
Plaintiff	)	
	)	Criminal No. 04-10217-GAO
v.	)	
	)	
DARREN F. WILDER	)	
	)	
Defendant	)	
_____	)	

**GOVERNMENT'S OPPOSITION TO DEFENDANT'S MOTION *IN LIMINE***  
**TO PRECLUDE EVIDENCE OF TESTIMONY REGARDING**  
**ENCASE FORENSIC SOFTWARE**

The United States of America, by and through its counsel, Michael J. Sullivan, United States Attorney for the District of Massachusetts, Assistant United States Attorney Dana Gershengorn and Sherri A. Stephan, Trial Attorney, United States Department of Justice, Criminal Division, Child Exploitation and Obscenity Section, hereby files this opposition to Defendant's motion *in limine* seeking to preclude expert testimony regarding Encase forensic software.

**I. PRELIMINARY STATEMENT**

The Defendant, Darren Wilder, is charged with transporting, receiving and possessing visual depictions of minors engaged in sexually explicit conduct, in violation of Title 18, United States Code, Section 2252. Defendant now seeks to preclude

evidence and testimony at trial related to the use of forensic software referred to as EnCase. Defendant argues EnCase does not pass muster under Daubert v. Merrell Dow Pharmaceuticals, Inc. 509 U.S. 579 (2003). To the contrary, EnCase is a reliable forensic tool used and relied upon worldwide by both government and the private sector.

## **II. ENCASE FORENSIC SOFTWARE**

EnCase forensic software (Encase) was used by the Government's expert computer forensic analyst to analyze the computer evidence seized from Defendant's residence. It is anticipated the Government expert's testimony would include how EnCase was employed to recover and view both active and deleted files, including text and image files from Defendant's computer hard drive. EnCase is a tool used to uncover, analyze and present forensic data. EnCase is used by law enforcement agencies worldwide to aid in the analysis of seized computer evidence and has been accepted and admitted in federal and state courts throughout the country. EnCase has been subject to testing, received peer review and publication, and is generally accepted as a valid and reliable forensic tool. As a result, it is worthy of judicial notice of its acceptance and reliability, and Defendant's request for a Daubert hearing should be denied.

## **III. ARGUMENT**

Before admitting the testimony of an expert witness, the trial judge is required to evaluate both the relevance and reliability of the proposed testimony. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). The Supreme Court stated that the relevance requirement is already embodied in Rule 702; "the evidence or testimony [is relevant when it] 'assist[s] the trier of fact to understand the evidence or to determine a fact in issue.'" Daubert, 509 U.S. at 591 citing Fed.R.Evid. 702. Reliability goes to the methodology used to reach the conclusion forming an expert witness's opinion. Id. At 595.

Until Daubert, the most widely prevailing standard for determining the admissibility of novel scientific evidence was that announced in Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923). There the court held that the principle or discovery upon which such evidence was based must have "gained general acceptance in the particular field in which it belongs" before such evidence is admissible. Id. In the aftermath of that case, the Frye "general acceptance test," as it has come to be known, itself gained widespread acceptance and the state and federal cases applying it are legion. Daubert, however, changed the landscape.

In that case, the district court applied the Frye test to proffered expert testimony attempting to link the drug Bendectin

to the plaintiffs' birth defects and found such evidence wanting; consequently the court excluded it. Daubert, 509 U.S. at 583-584. The Court of Appeals affirmed that evidentiary ruling, likewise concluding that the evidence failed to satisfy the Frye test. Id. at 584. The Supreme Court reversed, holding that Fed. R. Evid. 702 superseded the Frye test and that it was the standard by which the admissibility of scientific testimony was to be measured.<sup>1</sup> Id. at 587-588. In so doing, the Court characterized the Frye test as "rigid" and "austere," and it stated that that test is "at odds with the 'liberal thrust' of the Federal Rules and their 'general approach of relaxing traditional barriers to "opinion" testimony.'" Id. at 588-589 (quoting Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 169 (1988)). Thus, the Court made clear, Rule 702 was intended to expand the universe of admissible expert testimony beyond that which the Frye test would have permitted.<sup>2</sup>

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<sup>1</sup> Rule 702 states: If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of opinion or otherwise. Fed. R. Evid. 702.

<sup>3</sup> That this is so is especially apparent from the following passage in the Court's opinion: Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence. In addition, in the event the trial court concludes that the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude

The Court nonetheless recognized that under Rule 702 trial judges retain a gatekeeping function with respect to scientific testimony, as they are charged with ensuring that such testimony is both relevant and reliable. Id. at 589-590. More specifically, the Court stated that judges must make a preliminary assessment of whether the reasoning or methodology underlying the proffered testimony is scientifically valid and whether it can properly be applied to the facts in issue. Id. at 592-593. While emphasizing that the inquiry envisioned by Rule 702 is "a flexible one," the Court identified several factors which would ordinarily be pertinent: (1) whether the theory or technique in issue can be and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error of the technique; and (4) whether the theory or technique has gained general acceptance within a relevant scientific community. Id. at 593-594. Thus, the Court recast the Frye test as but one factor that a court might consider in making the admissibility determination.

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that the position is more likely than not true, the court remains free to direct a judgment, Fed. R. Civ. Proc. 50(a), and likewise to grant summary judgment, Fed. R. Civ. Proc. 56. . . . These conventional devices, rather than wholesale exclusion under an uncompromising 'general acceptance' test, are the appropriate safeguards where the basis of scientific testimony meets the standards of Rule 702. Daubert, 509 U.S. at 596 (internal cases citations and parentheticals omitted).

Following Daubert, lower courts were divided on the question whether its teachings applied only to expert scientific testimony or whether the Court had intended Daubert to encompass other expert testimony as well, such as that based on specialized (non-scientific) knowledge. The Court answered that question in Kuhmo Tire, a case involving proffered testimony of an expert in tire failure analysis regarding the cause of a tire blow out that had resulted in a fatal motor vehicle accident. 119 S. Ct. 1171-1172. Applying a Daubert Rule 702 analysis, the district court excluded the testimony and the Court of Appeals reversed, holding that Daubert was limited to scientific evidence, whereas the testimony at issue in Kuhmo Tire was predicated on "skill- or experience-based observation." Id. at 1173. The Supreme Court held that Daubert's general principles apply to all of the expert matters described in Rule 702. Id. at 1174-1175. It went on to emphasize the broad leeway afforded trial judges in determining the reliability of expert testimony and it made clear that the factors cited in Daubert might be pertinent to that inquiry in some cases but not in others and that still other identified factors may be considered on an ad hoc basis. Id. at 1175-1176.

Daubert and Kuhmo Tire both involved novel expert testimony. Nothing in those cases suggests that the Court intended to precipitate a reexamination of the reliability of expert testimony that has enjoyed longstanding acceptance by the courts.

Put another way, those cases do not suggest that in their aftermath the government now bears the burden of proof in the first instance of establishing the reliability of expert testimony of that sort. Indeed, several of the Court's pronouncements in those cases can be read as evidencing a contrary view. For example, in Daubert, the Court stated,

[W]ell established propositions are less likely to be challenged than those that are novel, and they are more handily defended. Indeed, theories that are so firmly established as to have attained the status of scientific law, such as the laws of thermodynamics, properly are subject to judicial notice under Rule of Evidence 201.

509 U.S. 593 n.11.

To similar effect is a passage in the Court's Kuhmo Tire opinion:

The trial court must have the same kind of latitude in deciding how to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides whether or not that expert's testimony is reliable. . . . [A] court of appeals is to apply an abuse-of-discretion standard when it "review[s] a trial court's decision to admit or exclude expert testimony." That standard applies as much to the trial court's decisions about how to determine reliability as to its ultimate conclusion. Otherwise, the trial judge would lack the discretionary authority needed both to avoid unnecessary "reliability" proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises. Indeed, the Rules seek to avoid "unjustifiable expense and delay" as part of their search for "truth" and the "jus[t] determin[ation]" of proceedings. Fed. R. Evid. 102.

Id. at 1176 (case citation omitted). This passage too

demonstrates the Court's recognition that there are types of expert testimony that are so well-established that their reliability may be presumed by the trial court, without resort to the needless delay and expense that a Daubert hearing would entail.<sup>3</sup>

A number of lower courts have so construed Daubert and Kuhmo Tire. For example, in Johnson v. Commonwealth, 12 S.W.3d 258, 261 (Ky. 1999), a case in which the defendant challenged the admissibility of microscopic hair analysis, the Supreme Court of Kentucky read Daubert as recognizing that lower courts can take judicial notice of scientific methods, techniques, and theories that are firmly established and are not obliged to "reinvent[] the wheel" in such instances. The court properly recognized that judicial notice of the reliability of a certain category of expert testimony does not preclude proof to the contrary. Id. at 262. It reasoned, however, that such "judicial notice relieves the proponent of the evidence from the obligation to prove in court that which has previously been accepted as fact by the

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<sup>3</sup>The Court in Kuhmo Tire also stated, "where such testimony's factual basis, data, principles, methods, or their application are called sufficiently into question, . . . the trial judge must determine whether the testimony has 'a reliable basis in the knowledge and experience of [the relevant] discipline.'" 119 S.Ct. at 1175 (quoting Daubert, 509 U.S. at 592). The implication of that remark is that the opponent of proffered expert testimony must sufficiently call into question the reliability of such testimony before a so-called Daubert hearing-- at which the proponent of the testimony would admittedly bear the burden of proof-- is warranted or required.



appropriate appellate court. It shifts to the opponent of the evidence the burden to prove to the satisfaction of the trial judge that such evidence is no longer deemed reliable.”<sup>4</sup> Id. See also Goodyear Tire and Rubber Co. v. Thompson, 11 S.W.3d 575 (Ky. 2000) (although Daubert applies to all expert testimony offered pursuant to Rule 702, “the application is markedly different depending on whether the method or technique, upon which the testimony is based, has been recognized as reliable by existing caselaw”).

The Supreme Court of Alaska is of a like view. In State v. Coon, 974 P.2d 386, 397-398 (Alaska 1999), a case involving a

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<sup>4</sup>Applying those parameters to the precise factual issue before it, the Kentucky Supreme Court in Johnson went on to state:

Although we have never specifically addressed the scientific reliability of this method of hair analysis, we must assume that it at least satisfied the Frye test of general acceptance; for otherwise, the evidence would never have been admitted in the first place. The absence in our previous opinions of any in-depth analysis under the “general acceptance” test was probably due to the overwhelming acceptance of this procedure as a reliable scientific method for the past fifty years. . . . Based on the overwhelming acceptance of this evidence by other jurisdictions, as well as our own history of routine admission of this evidence at trial, trial courts in Kentucky can take judicial notice that this particular method or technique is deemed scientifically reliable.

Id. at 262-263. Finding that the defendant had failed to prove that such hair analysis was no longer reliable, the court affirmed the trial court’s ruling admitting the expert testimony. Id. at 263-262.

challenge to the trial court's admission of spectographic voice identification, the court abandoned the Frye test in favor of Daubert. In so doing, it had occasion to address the stated concern of an amicus that under Daubert there will be increased litigation regarding non-novel evidence that had been deemed admissible under Frye. The court stated,

[W]hen an area of expertise is well-known and has been fully considered by the courts, a trial court may take judicial notice of its admissibility. The Supreme Court advocated this approach. Moreover, general acceptance remains a factor under Daubert. It also seems unlikely that methodologies that were admitted under Frye and that remain generally accepted in the appropriate community will be excluded, absent affirmative evidence of unreliability.

Id. at 402 (footnotes omitted).

The District Court for the District of Columbia put the matter succinctly in a case in which the defendant sought pretrial Daubert hearings on the admissibility of all of the government's proposed expert testimony, including that relating to ballistics and fingerprints (the defendant did not specify in what manner the testimony was alleged to be unreliable):

Although the Court must ensure that expert testimony is reliable and admissible, there is nothing in Kuhmo Tire or Daubert that requires the Court to conduct a pre-trial evidentiary hearing if the expert testimony is based on well-established principles. . . . When a principle is well-established, the questions are simply whether the expert properly applied the established scientific principle to the facts and whether the expert's credibility is compromised for reasons such as bias. These are matters that a jury usually is competent to evaluate after cross-examination and presentation of competing expert testimony. Accordingly, where expert testimony is based on well-established science, the courts generally have concluded that reliability

problems go to weight, not admissibility.

United States v. Cooper, 91 F. Supp.2d 79(D.D.C. 2000) (quoting Wright and Gold, Federal Practice and Procedure § 6266, at 265). Se also United States v. Nichols, 169 F.3d 1255, 1262-1263 (10<sup>th</sup> Cir. 1999) (affirming trial court's denial of a motion for a Daubert hearing where the challenged evidence-- expert testimony regarding chemical testing of an object recovered from the site of the Oklahoma City federal building bombing-- did not involve any new scientific theory and the testing methodologies employed were well-known techniques routinely used by chemists). Because of the expert testimony challenged by the defendant does not involve a novel scientific procedure, a Daubert hearings is both unnecessary and inappropriate; Defendant's motion should be denied.

A. **EnCase forensic software is worthy of judicial notice of its reliability; EnCase is generally accepted, its principles and methods have ben tested and found reliable, it has been subject to peer review and publication and is heavily relied upon and used by both the government and private sector.**

1. *EnCase's underlying principles and methods have general acceptance which appropriately lends to its reliability and therefore admissibility.*

As noted above, Daubert sets forth a non-exhaustive list of factors for courts to consider in performing their gatekeeping role for the introduction of expert testimony. One factor the Court should consider is whether the software has "general

acceptance" within the "relevant scientific [or technical] community." It is readily apparent that EnCase is generally accepted among law enforcement and legal communities as a reliable and necessary forensic investigation tool. EnCase is used world-wide and is the leading tool for law enforcement agencies at the local, state and federal level to conduct forensic examinations of seized computers. See Williford v. State, 127 S.W.3d 309, 311 (Tex. App. 2004). Both state and federal courts have permitted testimony based upon evidence retrieved and analyzed through the assistance of EnCase forensic software. Many courts, including the District of Massachusetts, have acknowledged the use of EnCase as a tool to retrieve and analyze forensic evidence.<sup>5</sup> See United States v. Frabizio, 341 F.Supp.2d 47 (D. Mass 2004); United States v. Hill, 322 F.Supp.2d 1081 (C.D.Cal. 2004); United States v. Grimmett, No. 04-40005-010-RDR, 2004 WL 3171788 (D.Kan. 2004); United States v. Long, 425 F.3d 482 (7<sup>th</sup> Cir. 2005).<sup>6</sup> In fact, the

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<sup>5</sup> Cases in this District in which witnesses testified about evidence obtained using EnCase include United States v. Habershaw, 2001 WL 1867803 and as recently as a few weeks ago in the trial of Martin VanVliet at Docket Number 02-10362.

<sup>6</sup> Other cases either challenging EnCase software of involving EnCase software include: State v. Cook, 777 N.E.2d 882 (Ohio App. 2002), Taylor v. State, 93 S.W.3d 487 (Tex. App. 2002), People v. Rodriguez, Sonoma County, California Superior Ct. no SCR28424 (EnCase was subject to a lengthy pretrial hearing which established its validity and reliability), People v. Merken, case no. 1815448 (Cal.Sup. Ct., San Francisco, May 1999), State of Nebraska v. Nhouthakith, Case No. CR01-13, District

government could find no case in which the use of the Encase software was not allowed. The widespread use of EnCase in the law enforcement community as well as its acknowledged functionality by the courts evidence its already well-accepted reliability under Daubert.

2. *EnCase's underlying principles and methods have been tested and found reliable and/or are commercially available for testing.*

Another factor the Court should consider is whether the principles and methods have been tested and found reliable and/or are commercially available for testing. The EnCase forensic software has been extensively tested. In 2003, it was tested by the Computer Forensics Tool Testing project (CFTT). See National Institute of Justice, Test Results for Disk Imaging Tools: EnCase 3.20 (2003) (hereinafter EnCase Test Results). The result of that test confirmed its reliability for use by law enforcement

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Court of Johnson County, Nebraska, United States v. Greathouse, 297 F.Supp.2d 1264 (D.Or. 2003), State v. Anderson, 2004 WL 413273, People v. Donath, 2005 WL 850895 (Ill.App. 1 Dist. Apr. 13, 2005), State v. Levie, 695 N.W.2d 619, 624 (Minn. App. 2005), State v. Luther, 105 P.3d 56, 58 (Wash. App. Div. 1 2005), Liebert Corp. v. Mazure, 2005 WL 762954 (Ill. App. 1 Dist., 2005), Porath v. State, 148 S.W.3d 402 (Tex. App.-Houston [14 Dist.], 2004), People v. Zavala, 2005 WL 605465 (Cal. App. 6 Dist. March 16, 2005), People v. Upton, 2004 WL 2075393 (Cal.App. 6 Dist. Sept. 17, 2004), State v. Howell, 609 S.E.2d 417, 419 (N.C.App. 2005), Fridell v. State, 2004 WL 2955227 (Tex. App. Dec 22, 2004), State v. McKinney, 699 N.W.2d 471, 2005 S.D. 73 (S.D. 2005), United State v. Bass, 411 F.3d 1198 (10<sup>th</sup> Cir. 2005), United State v. Davis, 61 M.J. 530 (Army Ct. Crim. App. 2005), United States v. Long, 425 F.3d 482, 484 (7<sup>th</sup> Cir. 2005), Foust v. McFarland, 698 N.W.2d at 29.

and the courts. For example, the testing found 1) "Encase never altered the original hard drive;" (Encase Test Results, page 5) 2) "Encase always identified image files that had been modified;" (Encase Test Results, page 6) and 3) "Encase always logged I/O errors." (Encase Test Results, page 6). In fact, extensive testing performed on the Encase software resulted in only three potential anomalies, none of which pertain to this case. And, perhaps most importantly, it showed that even when those anomalies occurred, they were apparent. EnCase Test Results at 16-19.

Defendant's reliance on the exclusion of deleted file recovery cases from the CFTT test for support in obtaining a Daubert hearing on Encase is both misguided and misleading. As the report noted, these types of cases "are not ever used to test any disk imaging tools . . . because deleted file recovery tools will be tested separately." Encase Test results, page 11. In other words, the true test in deleted image cases is simply whether deleted images are accurately acquired by a software, something the CFTT has already confirmed. Some explanation and an example are illustrative here:

The Windows Operating System (OS) stores and keeps track of files on the computer employing what is referred to as the File Allocation Table (FAT). The FAT can be likened to a table of contents which refers the Operating System to the specific

location of a file on the hard drive when it is needed. When a new file is created on the hard drive, the OS copies the contents of the file to an available sector on the hard drive and simultaneously updates the table of contents with an entry for the file and the specific physical location on the hard drive.

By the same token, when the user deletes a file, the OS records this action by removing that entry from the table of contents. ***The underlying data, however, is not removed.***

Physically the data still exists on the hard drive.

Conceptually, this is analogous to a librarian removing a card from the card catalogue: the card is gone, but the book itself is still on the shelf. Without reference to that book in the card catalogue, a person looking for that book may have to go through every book in the library to find it. While a herculean task, this can be accomplished, and it's verified once the book is found.

Likewise, when a file is deleted by the OS, the contents of the file are still available to be read from the hard drive. Encase, and the dozens of commercial tools like it, simply automate the herculean task of manually looking through every file on the hard drive. This "file recovery function" of Encase doesn't involve analysis or interpretation; it simply states what data is available. The value of the tool is that it can complete this search and report on it exponentially faster than can a

human being. Once it finds a "deleted" file, the tool simply points the examiner to the location of the file. The examiner does the actual analysis of the file with respect to the facts of the case.

Defendant's argument that CFTT did not conduct a test on this particular occasion and therefore Encase is invalid misses the point. The only relevant test for this case is in the acquisition process (are both active and deleted files copied to the evidence image). This process was in fact tested and, as noted above, Encase accurately copied the entire original (deleted and non-deleted) in every instance. Encase Test Results, page 5. In addition, as with the library example above, further validation of Encase's reliability in retrieving deleted files is readily available: When Encase reports that a deleted file is found at Location A, the forensic examiner need only look directly at Location A to see that file does in fact exist.

Encase is commercially available to the public and can be tested by anyone. Despite this, defense counsel has provided, and the government could find, no case declining to accept testimony based on the use of Encase software.

3. *EnCase's operation standards respond to a known rate of error and provide reliability in accordance the standards outlined in Daubert.*

Daubert also suggests the court take note of the known rate



of error and the existence and maintenance of standards controlling the technique's operation. Daubert, 509 U.S. at 594. As shown in the report provided by Defendant, extensive testing of Encase has found only three anomalies with the EnCase software: a BIOS anomaly, a logical restore anomaly and a restore anomaly. EnCase Test Results at 6. Defendant relies on these anomalies to support his argument that EnCase is not reliable, failing to recognize that Daubert does not require perfection in science; it requires only that errors be recognizable and that standards exist. Daubert does, however, look to relevance. Defendant has not shown, and indeed can not show, that any of the anomalies he relies upon in his request for a Daubert hearing are relevant to the case before the Court. Briefly, the first anomaly concerned the fact that Encase ignores entirely a small piece of a hard drive that is "not...used on a system with a legacy BIOS for any purpose by Microsoft operating systems or by typical application programs." Encase Test Report, Page 7. However, the piece could be used by other operating systems like Linux or UNIX. In other words, Encase doesn't copy an empty piece of the hard-drive that Microsoft doesn't even use. Since Defendant's operating system was Microsoft, and not Linux or UNIX, this anomaly is irrelevant to his case. The second anomaly, the "restore size anomaly," applies only to "the Windows 2000 environment." Encase Test Report, Page 6. Since Defendant

utilized Windows 98, this anomaly is equally irrelevant to his case. Finally, the third anomaly relied upon by Defendant, the "logical restore anomaly," applied to such a minute piece of the computer that "in no case was there any effect on sectors used in data files. All sectors of the image file [the copy] accurately reflected the original sectors." Thus, the report concluded that this "anomaly" had absolutely no effect on any actual data, and in fact was found only to be of possible consequence to the "Windows shutdown process." Encase Test Report, Page 6.

Daubert and Kumho Tire squarely address Defendant's concerns by relegating them to the appropriate arena of cross-examination. Nothing Defendant has raised supports the necessity for a Daubert hearing on what is clearly a long standing well-established method of law enforcement investigation.

4. *Encase forensic software has been subject to peer review and the subject of publications supporting its overall reliability.*

EnCase forensic software has been the subject of many publications and peer review. The most compelling peer review is the 2003 CFTT project, discussed here. Encase Test Results. The CFTT test was performed by some of the organizations who have relied extensively on its application, namely the United States Department of Justice and Department of Defense, and therefore meet the peer review standard. Id. at 4. Additionally, EnCase has been subject to publication and peer review in various print

media receiving high ratings. For example, See, Jon Tullett, EnCase Forensic, SC Magazine, Jul. 2005, ("Overall, we can find no fault with EnCase. Previous versions have performed solidly, and version 5.0 is a worthy upgrade"), CRN, Encasing Your Valuable Files For Investigation Purposes, ChannelWEB, Jun. 2005, (reporting on tests and reviews by AppleTech CEO Darrel Bowman and Jody Randall, an instructor for the National Security Agency-certified Computer Information Systems Security program), Mary Kathleen Flynn, Computer Crime Scenes, PC Magazine, Feb. 2002. Examples of other publications involving the widespread use and reliability of EnCase are being filed with this Court and are hereby incorporated by reference as Exhibits 1-8.

### **CONCLUSION**

As federal and state courts have found for years, EnCase meets the reliability requirements established in Daubert and hence the Federal Rules of Evidence, Rule 702. EnCase has been subject to extensive testing, has received extensive peer review and publication and is generally accepted as a valid and reliable forensic tool. EnCase is so widely used and accepted that it deserves judicial notice of its reliability and therefore admissibility. Any issues Defendant has with this well accepted piece of software can be adequately addressed through cross-examination. Defendant has provided absolutely no evidence that

a Daubert hearing in this case is warranted or appropriate. For the foregoing reasons, Defendant's request for Daubert hearing on EnCase should be denied, and expert witness testimony about EnCase and testimony based on evidence obtained through the use of EnCase should be admitted at Defendant's trial.

Respectfully submitted,  
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